

Internal Revenue Service

memorandum

CC:FS:PRO 10,54-91
JSMusen

date: DEC 6 1991

to: District Counsel, Washington, D.C. MA:WAS
ATTN: Dianne Crosby

from: Assistant Chief Counsel (Field Service) CC:FS

subject: Request for Formal Field Service Advice - Tax Court Rule 24(f) -
[REDACTED]

This memorandum is in response to your request for field service advice dated September 9, 1991. In that request you presented the following issues:

- (1) What action if any should a field attorney take under Tax Court Rule 24(f)?
- (2) If a letter pointing out a conflict of interest needs to be written to petitioners' counsel, should it be coordinated with the General Legal Services Division (GLS) either regionally or nationally?
- (3) What follow up action is required by the field attorney?
- (4) If the conflict can not be resolved either by unilateral action on the part of petitioners' counsel or informally between the parties, should the matter be brought by us to the attention of the Tax Court, presumably in a motion to disqualify?

After completing some preliminary research, we asked GLS for their views in a memorandum dated October 11, 1991 (attachment "A"). GLS responded initially in a memorandum dated November 22, 1991 (attachment "B"), and subsequently in a response dated December 3, 1991 (attachment "C"), which, among other things, was a clarification of their November 22 memorandum.

Based on our research and on the views expressed by GLS, we recommend that upon discovering a conflict of interest between petitioners and their attorney, action on our part is required. While we could not find any authority supporting the existence of an affirmative duty on the Service to bring a conflict matter to the attention of the Tax Court, we feel that the Service must engage in certain procedures in order to protect against the possibility of petitioners moving to vacate an unfavorable

09598

decision on the ground of inadequate counsel. The Tax Court granted such a motion in Wilson v. Commissioner, T.C. Memo. 1976-285, and although the court has not been particularly receptive to motions to vacate on the ground of conflict of interest, Wilson has never been overturned.

Moreover, since the apparent conflict in this instance stems from the innocent spouse issue, the likelihood of such a motion to vacate increases, because claims of inadequate counsel in that area are becoming all too common. See, e.g., Slavin v. Commissioner, 932 F.2d 598 (7th Cir. 1991).

One possible means of avoiding Wilson-like outcomes is to file a motion to disqualify. The filing of such a motion, however, must be tempered by the possibility that such action could be construed by the court as a tactical weapon being used by respondent to force concessions from the opposing party. Because such a finding could be the basis for the imposition of sanctions, precautions are necessary prior to filing the motion. First, the few cases brought before the Tax Court concerning this type of motion suggest that the motion appears less like a tactical move if it is filed early. See, e.g., Duffy v. Commissioner, 91 T.C. 81 (1988); Sanford Trust v. Commissioner, 52 T.C. 580 (1969). Second, if we could document informal efforts to resolve the conflict in a motion to disqualify, the motion to disqualify would further appear less like a tactical device.

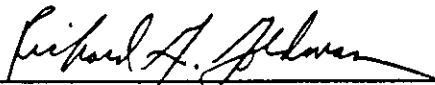
Therefore, we recommend the following: First, as soon as possible, you should try to resolve the conflict informally with petitioners' counsel. You should document such efforts with copies of correspondence which would eventually become exhibits in a motion to disqualify if informal attempts at resolution prove unsuccessful. If the petitioners are aware of the conflict but consent to the representation, you should request that petitioners and their attorney sign an agreement acknowledging this situation and that a copy of this agreement be forwarded to you. No coordination is required between the field and GLS either regionally or with the national office, or with the Field Service Division, at this stage.

If informal attempts fail, then as soon as possible, you should draft a motion to disqualify. The motion should state that disqualification is sought solely due to the absence of a clear expression by both petitioners that they wish to retain counsel in spite of the conflict. This motion may not be directly filed but must be forwarded for review and coordination by this office and with GLS. Review by the national office is necessary in order to ensure that motions to disqualify are reserved only for clear cases in which the Service has an articulable interest in disqualification, such as the need for an error-free determination by the court.

If you have any further questions on this matter, please contact Jordan S. Musen at FTS 566-3520.

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Attachments:
As stated.